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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE BANK OF NEW YORK, as Collateral Trustee, NEW JERSEY NATIONAL BANK, HARRIS TRUST AND SAVINGS BANK, and BOATMEN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Series Trustees, respectively,

Petitioners,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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RULE 29.6 LIST

The list of Petitioners' parent companies and nonwholly owned subsidiaries is found on page iii of the Petition for a Writ of Certiorari.

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PETITIONERS' REPLY BRIEF

Petitioners The Bank of New York, New Jersey National Bank, Harris Trust and Savings Bank, and Boatmen's First National Bank of Oklahoma submit this Reply Brief in further support of their Petition for a Writ of Certiorari. This Reply Brief will respond to certain points raised in Continental Airlines, Inc.'s Brief in Opposition. For a full statement of Petitioners' position on all points, Petitioners rely on their Petition for a Writ of Certiorari.

INTRODUCTION

Continental's Brief in Opposition argues that: (a) the Third Circuit interpreted and applied the doctrine of equitable mootness consistently with well-established principles of law as well as the law of other circuits; (b) this case does not present any broad issues of federal bankruptcy law or policy that require resolution by this Court; and (c) Petitioners have waived the argument that federal courts lack the authority to circumscribe a party's statutory right to appeal on policy grounds. As explained below, each of these contentions is meritless. Certiorari should be granted.

I.

THE THIRD CIRCUIT'S DECISION APPLIES THE DOCTRINE OF EQUITABLE MOOTNESS -- FOR THE FIRST TIME -- WHEN APPELLANTS "ARE NOT SEEKING TO UPSET THE PLAN"; THE DECISION BELOW IS NOT CONSISTENT WITH EITHER WELL-ESTABLISHED LAW OR THE LAW OF THE OTHER CIRCUITS

A. The Doctrine of Equitable Mootness Should Not Be Applied When the Appellant Does Not Seek to Upset the Plan of Reorganization.

Continental's contention that the Third Circuit's broad interpretation of the equitable mootness doctrine is consistent

with "well-established" principles of law as well as the law of other circuits is unfounded. *See* Brief in Opp. at 16-21. As the dissent below said, Petitioners "are not seeking to upset the plan of reorganization." App. 34a; *see also* Petition at 8-12. Rather, they are merely seeking relief to which they are entitled under the Plan. *See* Petition at 4, 17-18. Prior to the Third Circuit's decision in this case, no federal court had ever used equitable mootness to prevent a party from enforcing its rights under a plan of reorganization. Indeed, the doctrine of equitable mootness had always been used narrowly to protect the provisions of a confirmed plan of reorganization from attack once substantial consummation had occurred. *See, e.g.*, *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1554-57 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). Its use here, therefore, is unprecedented.

B. By Precluding Appellate Review Where the Article III Court Has Statutory Jurisdiction and Can Provide Relief Without Upsetting the Plan, the Court Below Has Applied a Different Legal Standard Than Other Circuits.

By expressly holding that federal courts may, in their *discretion*, decline to entertain the merits of bankruptcy appeals if they conclude that it would no longer be "prudent" or "equitable" to grant relief, the Third Circuit has dramatically broadened the equitable mootness doctrine beyond its application by other circuits. *See* Petition at 19-22. For example, the Fourth and Eleventh Circuits ask not whether it would be prudent or equitable to entertain the appeal, but rather whether effective relief remains available, as a practicable matter, under all of the circumstances.[1] As the six dissenting Judges below noted, this inquiry is "quite different" from -- and far

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1 *See, e.g.*, *First Union Real Estate & Mortgage Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992); *Central States Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 96 (4th Cir. 1988).

narrower than -- the Third Circuit's indeterminate discretionary balancing test. *See* App. at 30a. Furthermore, results under the circuits' varying interpretations of the scope of the doctrine can differ drastically. *See* Petition at 21-22 (comparing the results in *Chateaugay II* and *Chateaugay III* with the result in this case).

II.

PETITIONERS HAVE ALWAYS ARGUED THAT THEY ARE ENTITLED TO A SUBSTANTIVE APPELLATE REVIEW OF THE BANKRUPTCY COURT'S LEGAL RULINGS; INDEED, THAT IS THE ISSUE THAT BOTH THE PANEL'S DECISION AND THE *IN BANC* DECISION DECIDED

Continental's contention that Petitioners waived the issue of whether federal courts lack the authority "to decline to exercise statutorily authorized jurisdiction" or otherwise acquiesced in the application of the equitable mootness doctrine is meritless. *See* Brief in Opp. at 1, 16, 22-23. An issue is preserved for this Court's review if it was either raised or passed upon below. *See Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *see also United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 6.26, at 344 (7th ed. 1993).

Throughout the proceedings below, Petitioners consistently maintained that "a party simply should not be deprived of the opportunity to have an appeal resolved on the merits unless subsequent events have precluded the reviewing court 'from granting *any* effective relief' whatsoever." *See* Petitioners' Opening Brief Before the Third Circuit at 17 (emphasis in original). Petitioners never conceded -- as Continental now suggests -- that a bankruptcy appeal could be dismissed as moot based on a discretionary balancing of five "prudential" factors. Indeed, in opposing Continental's motion to dismiss before the District Court, Petitioners argued that the doctrine

of equitable mootness was "not recognized in the Third Circuit as a grounds to dismiss an appeal." *See* Petitioners' Brief in Opposition to Continental's Motion to Dismiss Petitioners' Appeal at 2-3.

Thus, Petitioners have consistently argued that they are entitled to have their appeal heard on the merits. *See, e.g.*, Petitioners' Opening Brief Before the Third Circuit at 16-30. That is what the appeals and the decisions below have been all about. Indeed, the dissent twice raised the issue presented in the Petitioners' first question for review (App. 27a-28a) and also specifically recognized a federal court's "virtually unflagging" obligation to exercise its statutory jurisdiction. App. 28a; *see* Brief in Opp. at 22.

Moreover, this Court has long held that the parties may "enlarge" upon the questions presented below so long as the "enlargement" may be deemed "fairly included" or "comprised" within the issues that were raised. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899); *see also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 3.20, at 137 (7th ed. 1993) (citing *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983)). Even if an issue has not been pressed or passed upon below, it may be raised in this Court where, as here, the lower court's decision rests on a serious misapprehension of federal law. *See United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (1980).

Accordingly, the questions presented in the Petition are preserved for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

III.

BY EFFECTIVELY GIVING THE BANKRUPTCY COURT THE ABILITY TO PRECLUDE ALL SUBSTANTIVE APPELLATE REVIEW OF NONDISCRETIONARY LEGAL RULINGS BY INCORPORATING THOSE RULINGS IN A CONFIRMATION ORDER, THE THIRD CIRCUIT'S DECISION WILL UNQUESTIONABLY AFFECT DEBTORS, INVESTORS, CREDITORS AND BANKRUPTCY JUDGES IN FUTURE BANKRUPTCY PROCEEDINGS

Continental's attempt to portray the Third Circuit's decision in this case as a "narrow" holding in a dispute about settled principles of law is unavailing. *See* Brief in Opp. at 1, 15, 23-24; *see also*, Point I above. A majority of the active Judges sitting on the Third Circuit voted to rehear this case *in banc*. That *in banc* hearing resulted in a 7-6 decision and a dissent that addressed far-reaching issues about the lack of review by an Article III court of substantive, nondiscretionary legal rulings made by a non-Article III bankruptcy judge. Obviously, this case has significant consequences for future cases and the conduct of debtors, investors, creditors and judges in bankruptcy cases. These consequences are real. That is why the six dissenting Judges below characterized the majority's opinion as creating a "bad precedent." *See* App. 27a.

Under the decision below, by simply incorporating orders denying administrative claims into confirmation orders, bankruptcy courts, debtors and prospective new owners can insulate the denial of valid administrative claims from any substantive appellate review. Plans of reorganization -- after disclosure statements, circulation, comment, opportunity to object, ratification votes and other procedures designed to ensure their overall fairness -- will be undercut by the new procedural device approved by the majority below. Indeed, Continental's factual presentation all but admits that the sole basis for denial of Petitioners' administrative claim was the Investors' statement that if the cap were exceeded, there

would be no investment. *See* Brief in Opp. at 2, 6-7. Thus, Petitioners' administrative claim was not treated as it should have been under the Plan.

Continental's contention that Petitioners' failure to obtain a stay of the Confirmation Order warranted the dismissal of their appeal as equitably moot is meritless. Because Continental's Plan of Reorganization expressly provided for the post-confirmation consideration, allowance and payment of Petitioners' adequate protection claim, effective relief clearly remained -- and remains -- available to them. *See* Petition at 4, 17-18.

Continental also argues that Petitioners waited six days to move for a stay and that the stay should have been sought in the Bankruptcy Court. *See* Brief in Opp. at 8. Petitioners promptly moved within the automatic ten day stay period and filed their appellate brief on the merits with their stay application. The stay was sought in the District Court and in the Bankruptcy Court.[2] It certainly cannot be the law that a party loses substantive rights because it moves on the sixth day of the ten day stay period instead of the third, fourth or fifth day, especially when that party serves its appellate brief before its notice of appeal is even due. *See* Bankruptcy Rule 8002.

Continental also argues that Petitioners refused to post a bond. Continental had demanded a bond of $450 million. *See* JA 1973; App. 99a. The District Court obviously expected a bond that bore some relationship to the amount of the investment. Petitioners were not able to post such a bond. Had the District Court had in mind a *de minimis* bond, it clearly would have said so. *See* Petition at 16.

Finally, Continental's argument that Continental "expressly stated its intention to consummate the Plan promptly" exposes

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[2] The District Court originally denied the stay on the basis that the Bankruptcy Court should consider the application first. The Bankruptcy Court was not available, however, and the District Court then heard the stay application on the merits.

the very dangers of the majority's decision. *See* Brief in Opp. at 9. Continental had earlier represented to the Bankruptcy Court that the Plan provided for the post-confirmation consideration, allowance and payment of Petitioners' administrative claim. *See* Petition at 5. In any event, the clear implication of Continental's argument is that Continental's expressed intention somehow becomes a restraint on Petitioners' statutory right to appeal. A debtor's expressed intention to consummate a plan so that rulings on administrative claims will become equitably moot should never restrict Article III courts from hearing statutorily authorized appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

December 9, 1996

Respectfully submitted,

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